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Supreme Court of the United States

OCTOBER TERM, 1953

No. 130

CLARENCE SORENSON, RICHARD E. PICKETT and NICK VOUTSIMAS, *Petitioners,*

against

CITY OF NEW YORK, *Respondent.*

ARISTOTLES DENDRINOS, JOHN BUGIURIS, COSTAS SCORDARIS, THOMAS WATLER, WILFRED M. SMITH, WILLIAM FERGUSON, JOSEPH P. McDONOUGH and STUART AINSWORTH, *Petitioners,*

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PETITION AND BRIEF IN SUPPORT FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM L. STANDARD,
Proctor for Petitioners.

LOUIS R. HAROLDS,
Of Counsel and on the Brief.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner Clarence Sorensen, on his behalf and on behalf of the remaining additional 42 seamen involved in the consolidated five suits herein, respectfully shows this honorable Court:

I

Summary Statement of Matter Involved

Your petitioner was one of 43 seamen who filed a total of 5 suits in Admiralty in the United States District Court for the Southern District of New York, to recover a balance of overtime wages which they had earned while they were employed as seamen on sludge boats owned and operated by the City of New York, a municipal corporation.

Since all of these 5 suits involved substantially the same subject matter and questions of law, it was stipulated that the suit entitled "*Sorenson* v. *The City of New York*" should be tried as the test case, with the decision therein to be binding on the remainder of the cases; and that all the enumerated cases and claims be consolidated for the purpose of entering one decree applicable to all (Ex. 5, fols. 341-3).

The libel alleged that Sorensen was employed as a seaman on certain of the City's vessels; that at various times from 1938 to 1946 respondent required him to perform services over and beyond his regular hours and days of work, under circumstances entitling him to payment of overtime, but that the City refused to make payment; and that therefore this suit was brought seeking overtime as well as extra wages for the delay in making payment, pursuant to the provisions of 46 U. S. Code, Sections 596-7 (fols. 19-23).

The answer admitted the employment but denied that any overtime was due; and asserted as a separate defense

that libellant could not recover, because he had failed to sign the payrolls under protest (fols. 25-27).

Preliminary questions of law were decided by Hon. Sylvester J. Ryan, United States District Judge, following a pretrial hearing, by a written opinion (fols. 41-53) reported in 86 F. Supp. 688.

The case was subsequently tried before Hon. Edward Weinfeld, United States District Judge, who thereafter likewise wrote a comprehensive opinion (fols. 385-417) reported in 98 F. Supp. 411. A decree was entered dismissing the suit (fols. 427-432), and an appeal followed (fols. 4-9). The Court of Appeals affirmed, by opinion dated March 20, 1953.

The pertinent facts are as follows:

These seamen were engaged to work an eight-hour day. Notices were posted on the bulletin boards of the vessels involved, confirming that fact, and advising the crews that they were governed solely by Federal Law, and not by the New York State Labor Law.

Under Section 220 of the New York Labor Law, certain workmen designated "laborers and mechanics" employed by the City, were entitled to be paid the same "prevailing rate of wages" as was applicable to private industry, based on the normal non-overtime work week (See *Smith* v. *Joseph*, 275 App. Div. 201, 88 N. Y. Supp. (2d) 818, aff'd 300 N. Y. 516. For the New York Labor Law procedure available to at least shore employees of the City, who are compelled to work overtime, see also *Wright* v. *State of New York*, 233 N. Y. 44).

For a number of years these seamen were required to work overtime pursuant to their captains' orders and in the absence of any emergency. For part of their overtime, they were compensated by receiving time off with pay, but for the balance of the overtime, they received neither time off, nor pay, although they were assured by

their captains, and by the Superintendent of the Department of Public Works in charge of sludge boat operations, that they would eventually be fully compensated, either in cash or equivalent time off.

Relying on the bulletin board notices posted by their employer on the vessels, to the effect that the New York Labor Law was not applicable to them as seamen (which instructions were probably correct), and relying on further promises of their superiors, petitioners never instituted proceedings under Section 220 of the New York Labor Law to adjust their prevailing rate (to that applicable in private industry) so as to take into consideration the overtime hours required of them. When they were eventually told that the City would not reimburse them for the balance of overtime still due, these suits were filed.

The courts below have held that the promises made by the petitioners' superiors on the vessel and ashore could not be enforced, because no one had the authority to bind the City by such promises, by reason of Section 160(3) of the New York Labor Law and Section 67 of the City Charter. The District Court further held that signing of the payroll periodically, with but one or two protests, constituted an accord and a satisfaction under Section 93C-20 of the Administrative Code of the City. (The Court of Appeals did not pass on this latter point). Petitioners assert that these rulings permit local law to impose involuntary servitude on seamen and to discriminate against them; and that they permit local law to be effective in violation of Federal provisions applicable to seamen.

II

Questions Presented

1. Where a municipally employed seaman is required by the master and his other superiors to work hours in excess of his normally stipulated 8 hour work day, in the absence of an emergency, is he entitled to overtime pay?

2. Where the City has for many years recognized a right to reimburse its seamen for overtime work, by giving them equivalent time off with pay, even though there is no statute or regulation which authorizes the City to give such compensation for overtime, does the man who is ordered to work hours in excess of his regular hours by his master, have the right to expect that he will be compensated in some form for the extra hours of work thus ordered?

3. If the seaman signs the payroll without reservation, on receiving his base wages, noting a written protest only once or twice over a period of years, during which he nevertheless continues, to the knowledge of his superiors, to assert his overtime claims by personal talks with his superiors on the ship and ashore, and is repeatedly assured that the matter is being taken care of, does his acceptance of his base wages constitute a full accord and satisfaction of his overtime claim?

4. Does the fact that respondent is a municipality, delimit and alter libellant's right to wages as a seaman under federal substantive law, i.e. if he were entitled to his overtime had respondent been a private employer of seamen, does he lose that right because respondent is a municipal corporation?

5. Where the local policy (that municipal employees shall not be paid for overtime work in the absence of an

express statutory provision to that effect), comes in conflict with the federal maritime policy (that seamen must obey their superiors' orders to work, and will be protected as wards of the court against their employer taking undue advantage of them), which policy shall be given preference? (The City here expressly impressed on the men that federal provisions applicable to seamen, particularly with reference to discipline and working conditions, would be strictly enforced, and that provisions of the State Labor Law would not apply.)

6. Where a municipality has recognized in writing that its seamen shall have an 8-hour work day; and where it has actually recognized on many occasions that those of its seamen who are ordered to work beyond an 8-hour day are entitled to overtime compensation at least by frequently giving them equivalent time off, and by assuring the seamen that questions involving payment of the balance of overtime still remaining were being considered by superiors ashore, and that compensation in some form would eventually be made; and where the balance of overtime ordered by the ship's master and worked by the seamen has nevertheless not been compensated for, either by cash or equivalent time off, and many of these seamen are now no longer employed by the City, are they, as wards of the Admiralty Court, entitled to recover overtime wages from the municipality which was unjustly enriched by their services, or are they to be denied payment for such services?

The District Court put the issue this way: (1) Was there an implied contract to pay overtime—a question which involves the capacity of the City to enter into such an agreement? (2) Was the failure to note a written protest on signing the payroll an accord and satisfaction under the facts in this case (395-396)?

The Court expressly recognized that the facts of this case would make out one of implied contract if the respondent were a private employer (fol. 398), but held that since it was a municipality, another result should follow.

The District Court Judge thus came to the conclusion that no essential prejudice would result to the characteristic features of the General Maritime Law by disregarding it in this case in favor of local law (fol. 404), and he held, therefore, that where the City is the employer, its master may order the seamen to work overtime in the expectation that payment will be made—an expectation confirmed by express assurances of shoreside superiors, but that nevertheless the City could rightly thereafter refuse to honor such an express or implied promise and would be justified in refusing payment for such extra services rendered; and (2) that a City-employed seaman, who signs his payroll on receiving his base earned wages, without noting his written protest thereon, unlike other seamen, waives any right which he may have to be paid overtime wages earned.

We respectfully submit that such a result is morally as well as legally indefensible.

Jurisdiction

The jurisdiction of this Court rests on Section 1254(1) of Title 28 of the United States Code.

The decision of the Court of Appeals for the Second Circuit in the instant case was rendered in an opinion dated March 20, 1953.

The Federal Court initially had jurisdiction because a seamen's employment contract aboard a vessel is concededly a maritime contract, governed by Federal Law.

> *Isbrandtsen Co. Inc.* v. *Johnson,* 343 U. S. 779, 72 Sup. Ct. 1011 (1952).

III

Reasons for Allowance of Writ

Petitioners advance the following reasons why this Honorable Court should grant the prayer of this petition:

A—The decision below presents an important question of maritime law not heretofore squarely determined by this Court.

B—The decision below affects the rights of seamen employed by municipalities in the various sea ports of the United States, and will have an important effect in determining whether they are to be governed by the uniform requirements of the federal maritime law; or whether, on the other hand, their rights are to vary from port to port.

C—The decision of the court below permits municipalities to pass laws which invade areas, which this Court has held are matters of Federal concern, preempted by Congress.

> *Isbrandtsen Co. Inc.* v. *Johnson,* 343 U. S. 779, 72 Sup. Ct. 1011, 1017 (1952);
> *Workman* v. *City of New York,* 179 U. S. 552, 21 Sup. Ct. 212.

D—If the decision of the court below is permitted to stand, then captains of City sludges may be limited in their right to enforce unquestioning obedience to orders involving overtime, and will weaken their authority as set forth in *NLRRB* v. *Southern RR S. S. Co.,* 316 U. S. 31, 62 Sup. Ct. 886 (1942); for to hold otherwise would mean that such seamen, as distinct from all others, could be held in involuntary servitude, merely because their employer is a municipal corporation.

E—It has been held that a seaman employed by the City, is governed only by federal law when he is injured, and his rights may not be delimited by local law.

Frame v. *City of New York*, 34 F. Supp. 194 (S. D. N. Y., 1940);
Bailey v. *City of New York*, 55 F. Supp. 699 (S. D. N. Y., 1944).

Why then should a different rule be applied to a seaman's wages?

F—To hold that there was an accord and satisfaction in this case, by a mere failure to note continual protests on the signing of the payrolls, under the circumstances of this case, would violate the law applicable to seamen's releases, as enunciated in *Garret* v. *Moore McCormack Lines, Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942).

IV

For the reasons advanced herein, and in the brief supporting the application, your petitioner is advised and believes that the determinations below were erroneous and should be reviewed by this Honorable Court.

WHEREFORE, your petitioner prays that a writ of certiorari may issue, directed to the United States Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record of all proceedings had in said Court in the above entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

Respectfully submitted,

CLARENCE SORENSEN,
Petitioner.

STATE OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK } ss.:
COUNTY OF NEW YORK

WILLIAM L. STANDARD, being duly sworn, says that he is the attorney for Clarence Sorensen and other petitioners herein; that he has read the said petition subscribed by him and that the facts therein stated are true to the best of his knowledge, information and belief.

WILLIAM L. STANDARD.

Sworn to before me this
17th day of June, 1953.

MALCOLM B. ROSOW
NOTARY PUBLIC, State of New York
No. 30-[illegible]
Qualified in Nassau County
Commission Expires March 30, 1955

I hereby certify that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

WILLIAM L. STANDARD,
Attorney for Petitioner.

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PETITIONERS' BRIEF ON APPLICATION FOR WRIT OF CERTIORARI

I

Facts

The Court's findings of fact established conclusively that:

a) the overtime work was ordered by the captains;

b) compensation had been made over the years for such extra work, at least by giving the men some equivalent time off with pay;

c) responsible officials acting on behalf of the City had given assurance to the captains and crews that extra payment would be made; and

d) the orders were given, and the work was performed, with the expectation that the men would eventually receive compensation therefor in cash or equivalent time off with pay.

The City itself, for many years, had prominently displayed notices on its ships' bulletin boards, in the form of a Special Order, warning its seamen that the provisions of the New York Labor Law did not apply to them, since they were bound only by Federal Law. In this case it has now made a complete about-face, and is claiming exactly the opposite. (By this means respondent had effectively impressed on the seamen that they would not be entitled to seek "prevailing wage rates" applicable to other Municipal employees under the provisions of the New York Labor Law; yet now, when these employees seek to assert their rights, as seamen, under the Federal Law, the City has successfully contended that the New York Labor Law does apply to them.)

POINT I

Petitioners are seamen suing on a cause of action cognizable in Admiralty: their rights and obligations differ from those of shore workers.

The sludge boats on which these seamen were employed are certificated by the U. S. Coast Guard, and licensed as coastwise vessels (fol. 340). They carry crews which have varied in number from 11 to 17 men (fol. 64), who were required to have certain minimum sea experience, as well as licenses or certificates issued by the U. S. Coast Guard (fol. 380).

The work of these ships consists of loading sludge or sewerage at Wards Island, Tollman's Island, Bowery Bay and Jamaica, disposing of it at a dumping area at sea, with each round trip encompassing about 70 miles. The vessels are self-propelled (fol. 65).

It is clear that the men employed aboard these vessels are to be deemed "seamen", though their work is local in character, and though they do not sign shipping articles. Both Judge Ryan's and Judge Weinfeld's decisions recognized that to be the fact.

See also:

Pariser v. *City of New York,* 146 F. (2d) 431 (C. C. A. 2d, 1945).
Bailey v. *City of New York,* 55 F. Supp. 699 (S. D. N. Y., 1944).
Frame v. *City of New York,* 1940 A. M. C. 935.
Gabagan Cost. Corp. v. *Armao,* 165 F. (2d) 301 (C. C. A. 1st, 1948), cert. den. 333 U. S. 876.

In *Saylor* v. *Taylor,* 77 Fed. 476 (C. C. A. 4th, 1896), the Court pointed out that under R. S. 4612 (46 U. S. C. A. 713), every person engaged to serve in any capacity on

board a vessel is deemed to be a seaman, and that under the Revised Statutes, any contrivance "capable of being used as a means of transportation on water", is a vessel.

The Court stated (p. 479):

> " * * * And so it seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world. Hence it is that in all times and in all countries those who are employed upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight, to the accomplishment of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, 'no matter what may be their sex, character, station, or profession'. Ben. Adm. § 241."

It is now well established that wages for a seaman's services, though earned in port, or in local waters, give rise to a maritime contract within the Admiralty jurisdiction.

Pacific Mail S. S. Co. v. *Schmidt,* 209 Fed. 264, aff'd 214 Fed. 513 (C. C. A. Cal., 1914).
The Navis, 196 Fed. 843.
The May Queen, Fed. Cas. No. 9360.
Coffin v. *The Progresso,* 46 Fed. 292.
The Enterprise, Fed. Cas. No. 6151.
Wishart v. *The Joseph Nixon,* 43 Fed. 926.
The Atlantic, 53 Fed. 607.

In the Court below the respondent cited many cases involving shore side employees, but such cases cannot be considered in determining a seaman's rights. Where a shore employee is ordered to work overtime, or to perform

a particular duty which is distasteful to him, he may quit at any time with impunity and walk off the job. (This right, of course, may be unrealistic where civil service shore employees of the City of New York are concerned, because in quitting, they might jeopardize their civil service status and rights.) Where a seaman is concerned, however, he has no such right to quit, if, while he is aboard a ship, he is given an order to perform a particular duty.

U. S. v. *Boykin*, 49 F. (2d) 762.
Howarth v. *U. S. Shipping Board*, 24 F. (2d) 374.

If a seaman individually refuses to obey an order to perform duty, then he would be guilty of misconduct under R. S. 4450, as amended. He might also forfeit his pay as a deserter (*Barfield* v. *Standard Oil Co.*, 172 Misc. 95, 14 N. Y. Supp. (2d) 627), and the U. S. Coast Guard would have jurisdiction in addition to try him, and revoke or suspend his seaman's papers. As a matter of fact, Special Order No. 234 (Exhibit attached to Libellants' Exhibit 5), subdivisions 8 and 9, expressly warn the sludge boat employees such as the libellants that:

> "8. * * * All employees are charged with a knowledge of this General Order and of all Federal statutes and marine regulations governing their conduct and the operation and maintenance of motor sludge vessels.
>
> 9. If any employee assigned to a vessel is suspended by the Bureau of Marine Inspection and Navigation, U. S. Department of Commerce, for an infraction of its regulations, it shall automatically result in suspension, without pay, by the Department."

And if the refusal to obey an order to work is carried out by collective action, then the seamen involved might be subject to punishment under the mutiny statutes—and this, despite the fact that the vessel may be in a safe domestic harbor at the time of the refusal to obey.

N. L. R. B. v. *Southern S. S. Co.*, 316 U. S. 31, 62 Sup. Ct. 886 (1942).

In the *Southern Steamship Co. case,* supra, seamen refused to sail their vessel from a domestic port, pursuant to a strike over employment conditions. The N. L. R. B. found that the employer had performed certain unfair labor practices which were the precipitating causes of the strike, and ordered that the men be reinstated with back pay. The Board's decision was reversed by the Supreme Court, which held that the action of the seamen, in refusing to obey the orders of their superiors, by a strike, was in violation of the Federal mutiny statutes, and therefore they were not entitled to reinstatement or back wages. The Court stated:

* * * * * * *

"(5) Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Everyone and everything depend on him. He must command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized. On the one hand, it has imposed numerous prohibitions against conduct by seamen which destroys or impairs this authority. We shall consider in a moment the nature and scope of the criminal sanctions imposed in case of revolt and mutiny.

* * * * * * *

On the other hand, workers at sea have been the beneficiaries of extraordinary legislative solicitude, undoubtedly prompted by the limits upon their ability to help themselves. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages and return transportation to this country if destitute abroad. U. S. C. Title 46, §§ 651-692, 1131, 46 U. S. C. A. §§ 651-692, 1131.

* * * * * * *

It has long been settled that the admiralty and maritime jurisdiction of the United States includes all navigable waters within the country. The Genesee Chief, 12 How. 443, 13 L. Ed. 1058. The water in

the harbor of Houston is certainly navigable, and a boat at dock there is obviously within the territorial limits of the United States.

* * * * * * *

(9, 10) The difficulty with the contention is that it ignores the plain Congressional mandate that a rebellion by seamen against their officers on board a vessel anywhere within the admiralty and maritime jurisdiction of the United States is to be punished as mutiny.

* * * * * * *

And before a seaman's certificate is issued by the Bureau of Marine Inspection and Navigation the applicant must take an oath to '* * * carry out the lawful orders of my superior officers on shipboard'.

* * * * * * *

The strategy of discipline is not simple. The maintenance of authority hinges upon a delicate complex of human factors, and Congress may very sensibly have concluded that a master whose orders are subject to crew's veto in port cannot enforce them at sea."

If, therefore, a seaman is ordered to work overtime, he must obey, and it would appear to follow as a reasonable corollary, he would be entitled to be paid.

POINT II

Petitioners' rights as seamen are governed primarily by Federal law, rather than by local law.

In *Workman* v. *City of New York,* 179 U. S. 552, 21 Sup. Ct. 212 (1900), the question at issue was whether the City could rely upon local law to avoid liability for property damage caused by one of its fireboats. In holding that local law was inapplicable to destroy a right given by maritime law, the Court pointed out that the principle enunciated applied to contract actions, as well as to tort

actions. Mr. Justice White, in explaining the reasons for holding the City liable, stated (p. 213):

> "Having thus determined the general principle by which the liability of the city was to be judged, the court reviewed some of the decisions of the court of appeals of New York, and deduced from them that the city, in the operation of the fireboat, performed a governmental, not a corporate, function, and, therefore, under the assumption that the decisions in question were authoritatively controlling, held the city not liable.
>
> * * * * * *
>
> The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrong done, instead of being general and ev[illegible] abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. * * *"

Page 215:

> "* * * This must be the inevitable consequence of admitting the proposition which assumes that the maritime law disregards the rights of individuals to be protected in their persons and property from wrongful injury, by recognizing that those who are amenable to the jurisdiction of courts of admiralty are nevertheless endowed with a supposed governmental attribute by which they can inflict injury upon the person or property of another, and yet escape all responsibility

therefor. * * * *For the principle which would exempt the municipal owner of a fireboat from legal responsibility would be equally inapplicable to boats used by a street department for the removal of refuse,* to ferries, to pilot boats, to training-school ships—one of which, it is suggested in argument, the city of New York now actually operates, and to all other vessels which the municipality might consider it necessary or desirable to use. The wrong and injustice which would thus arise need not be commented upon.

* * * In doing so, it becomes manifest that the decisions of this court overthrow the assumption that the local law or decisions of a state can deprive of all rights to relief, in a case where redress is afforded by the maritime law, and is sought to be availed of in a cause of action maritime in its nature and depending in a court of admiralty of the United States." (Italics supplied.)

Page 219:

"It results that, in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fireboat was engaged—even if such claim for the purposes of the case be conceded—was without foundation in the maritime law, and therefore afforded no reason for denying redress in a court of admiralty for the wrong which the courts below both found to have been committed."

In *Frame* v. *City of New York,* 1940 A. M. C. 935 (S. D. N. Y.), there was a claim by a seaman employed on a New York City ferry boat. Judge Bondy similarly pointed out that the local laws of a state or municipality may not alter, contravene or prejudice the policy or uniformity of our maritime law, as expressed in any act of Congress, or in

the provisions of our General Maritime Law. He stated that local laws respecting municipal liability, or any local statutory conditions precedent to municipal liability, are overridden "by the law of the sea". After expressing those views in a seaman's personal injury case, the Court further stated with reference to the contractual aspect of the seaman's claim, at page 938:

> "The statutory requirements relied upon by the defendant are also inconsistent with the uniform operation of the maritime law in so far as the action for maintenance and cure is concerned. The right of a seaman against his employer for maintenance and cure is implied in law as a contractual obligation arising out of the nature of the employment and is founded upon the general maritime law. Pacific Steamship Co. vs. Peterson, supra; Cortes vs. Baltimore Insular Line, Inc., 287 U. S. 367, 1933 A. M. C. 9. The constitutional requirement of uniformity obtains even though the right of action is not statutory in origin. Workman vs. New York, supra; Southern Pacific Co. vs. Jensen, supra."

The (Budget) contract of employment there also did not expressly recognize the right of maintenance and cure as an implied contractual obligation, but the Court nevertheless gave effect to it. To the same effect see *U. S.* v. *Port of Portland,* 300 Fed. 725 (C. C. A. 9th, 1924).

It is perhaps significant that in *Bailey* v. *City of New York,* 55 F. Supp. 699 (S. D. N. Y., 1944, Conger, D. J.), the City of New York insisted and contended that its Civil Service mariners worked 8 hours a day, six days a week (p. 701). The Court there pointed out that the libellants, who were employed on the City's ferry boats were entitled to all the rights of seamen, although they were City employees, under Civil Service, who boarded and lived at home.

See also *Gahagan Const. Corporation* v. *Armao,* 165 F. (2d) 301 (C. C. A. 1st, 1948), cert. den. 333 U. S. 876, where it was held that one who works on a dredge, eating and

sleeping ashore, and paid at an hourly rate, is a seaman who is entitled to all of the rights of a seaman; and that even when such a seaman accepts benefits under a state law, without protest, it would not affect any of his rights as given by Federal law, Circuit Judge Mahoney stating at page 307:

> "In cases involving actual releases, the courts are scrupulous to see that the plaintiff fully understood the rights that he was giving up. Here, there was no actual release given by the plaintiff, and we do not think such a release should be implied from the receipt of payments."

In the *Gahagan* case, the Circuit Court undoubtedly had in mind the extremely liberal rule adopted in *Garrett* v. *Moore-McCormack Lines, Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942), where it was held that even the signing of a release by a seaman (which was certainly not the case here), would not preclude his asserting rights which were not properly compensated for at the time the release was taken —*with the burden on the employer* to prove that the release was given for a fair consideration, and with knowledge by the seaman of the rights which he was surrendering, etc. In the *Garrett* case the Court again pointed out that state law cannot be applied to a seaman's case.

See also *Southern Pacific* v. *Jensen*, 244 U. S. 205, 37 Sup. Ct. 524 (1916), where it was held that a state statute which attempts to regulate maritime employment, by a Compensation Act involving shipping, would be unconstitutional.

In *Alsaka S. S. Co.* v. *Mullaney*, 180 F. (2d) 805 (C. A. 9th, 1950), the Court stated at pages 812-813:

> "Finally, attention is called to the existence of a body of general maritime rules independent of any statutory enactment as exemplified by such cases as Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas.

1917E, 900; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, and Washington v. W. C. Dawson & Co., 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646. It is said that one of the purposes of these rules is to establish, in the field of maritime law, harmonious and uniform rules applicable throughout every part of the Union.' The existence of this body of law, it is said, constitutes an implied prohibition of any local enactment calling for withholding from seamen's wages. The contention is that 'no statute of a state or territory can be valid if it prejudices the symmetry of the general maritime law.'

* * * * * *

It must be agreed that the statutes referred to were enacted by Congress to protect seamen 'who, as a class are poor, friendless and improvident' and through the protection afforded by these acts to induce them 'to accept employment in an arduous and perilous service', that these enactments took into account the fact that the seaman was unable 'to cope effectively with his employer in bargaining', and that it was sought to prevent voluntary or involuntary assignments 'which would interfere with the remedy in admiralty for the recovery of his wages by condemnation of the ship'. We agree that in respect to legislation designed to accomplish these objectives Congress has occupied the entire field.

The cases dealing with state legislation extending workmen's compensation laws to seamen expound the general policy, both of the Acts of Congress, and of admiralty law independently of statute, to assure uniformity in this field. We recognize that policy, and if we were dealing with a territorial act creating new rights or altering old rights, as between the seaman and his employer, we would necessarily enforce it."

We have seen that if a man's employment actually has to do with the operation of a vessel, then no local law can ever be operative, even though Congress may never have legislated with reference to it, because it comes exclusively under Federal jurisdiction. But if the employment is really *local* in nature, as in the case of a pier watchman

who is not a seaman, then a local law would not be deemed to interfere with the uniformity required in maritime matters; but this, only where Congress has not legislated with respect to the matter in question.

> *Rudel* v. *Malloy S. S. Co.*, 196 App. Div. 794, 188 N. Y. Supp. 649 (3rd Dept., 1921).

Other examples of matters or employments of local concern, as to which a state might probably act, where Congress has been silent, would be:

Workers performing labor on an incompleted ship; river divers employed by a shipbuilding company; longshoremen injured on land; persons employed as cargo inspectors, etc.

But the cases already cited, establish without doubt that a state may *not* legislate with reference to a *seaman*, such employment having such a relation to commerce and navigation, as to be constitutionally immune from local laws.

> *Gahagan Const. Corporation* v. *Armao*, 165 F. (2d) 301 (C. C. A. 1st, 1948), cert. den. 333 U. S. 876.

In fact, even the unloading of a ship by a longshoreman is not a matter of local concern, but has such a relation to commerce and navigation, that no state may legislate with reference to such employment.

> *Employers' Liability Ass. Corp.* v. *Cook*, 281 U. S. 233, 50 S. Ct. 308 (1930).
> *Northern Coal & Dock Co.* v. *Strand*, 278 U. S. 142, 49 Sup. Ct. 88 (1928).

Further, Congress has acted with reference to a seaman's hours of employment (46 U. S. Code, Sec. 673), and with reference to other detailed aspects regarding seamen's wages. See *Shilman* v. *U. S. and Grace Lines*, 164 F. (2d) 649 (C. C. A. 2d, 1947), cert. den. 68 Sup. Ct. 608 (1948), wherein the Court stated at pages 650-651:

"In port, a seaman is entitled to demand one-half of his unpaid wages, and when his employment is at an end, he must receive the remainder of the wages due. So important did Congress feel this provision was, that the section was expressly made applicable not only to American seamen, but also to foreign vessels in United States harbors. 46 U. S. C. A. § 597.

Except as expressly provided by law, a seaman cannot give up any right to wages, or any remedy for the recovery of same, even by agreement. 46 U. S. C. A. § 600.

His wages are not subject to attachment or arrestment, even by court action, except that a court is given the limited power to order wages withheld, only for the support of a wife and minor children; and no advance assignment of wages is valid, except for payment of an allotment to a relative, made out in the manner authorized and prescribed by law. 46 U. S. C. A. § 601."

* * * * * *

"The above sections look towards payment to the seaman by his employer, at the termination of the employment, of all of his earned wages, without any deductions except those which are expressly authorized by statute."

See also 46 U. S. C. A. Sections 596-597, which provide that seamen, employed on foreign and coastwise or "coasting" voyages, are entitled to two days' pay for every day their wages are withheld without sufficient cause.

It has been held in a case involving this statute, that the country's coast means all of its border washed by the sea.

Mahar v. *Gartland S. S. Co.*, 154 F. (2d) 621 (C. C. A. 2d, 1946).

U. S. v. *Bain*, 40 Fed. 455.

It has further been held that where, as in this case, a tug is licensed to carry on coasting trade, then it is a vessel covered by these statutes.

Standard Dredging Co. v. *Barnalla*, 163 S. E. 367, 158 Va. 367 (1932).

Since it is conceded that, in this case, the sludge vessels on which petitioners were employed were licensed as coastwise vessels, and since their activities carried them in and out of New York Harbor off the coast of this country's borders "washed by the sea", the above Federal statutes would seem to apply.

In *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 72 Sup. Ct. 1011 (1952), in a seaman's suit for wages, the Court stated on page 1015:

> "Congressional legislation now touches nearly every phase of a seaman's life. It concerns itself with his personal safety, comfort and health in many ways not necessary to review here. It deals specifically with * * * the payment to him of his wages."

* * * * * * *

Page 1017:

> "From this we conclude that Congress has preempted an area relating to * * * a seaman's claim to his wages."

The foregoing would appear to indicate conclusively that the payment of seamen's wages is a matter of Federal concern, and may not be regulated by local statutes or regulations.

POINT III

A municipality may be held liable to a seaman to the same extent as any other employer of seamen.

If respondent were a private corporation, then there is no doubt but that it would be required to pay libellants for services ordered beyond their regular working days and hours. Thus, in *Bender* v. *Waterman Steamship Corporation,* 1946 A. M. C. 1322 (D. C. Pa.), District Judge Ganey stated at page 1327:

> "By the same token, if the doing of the work is in excess of or beyond regular hours for which the seaman contracted to perform, he is entitled to wages at the prevailing or agreed rate for those extra hours."

In the *Lakme,* 93 Fed. 230, the Court stated:

> "Seamen may be required to perform extra work in maneuvering ship or handling cargo by the master at any time, he being the sole judge of its necessity; but when required to do such work not contemplated by their shipping articles, and which is merely to the advantage of the owners or charterers, they are entitled to receive reasonable wages therefor, or, if induced by promise of payment, to receive the amount agreed upon."

In both the *Bender* and *Lakme* cases, the Court held that the seamen involved were not precluded from claiming the extra wages by the fact that they accepted only their regular pay at the time the voyage was terminated.

It is, therefore, clear that if the respondent were a private corporation, it would be liable for the libellants' overtime wages. Judge Weinfeld, the Trial Judge, recognized this in his opinion, stating at folio 398:

> "Although these directions and promises might justify the conclusion that an implied contract existed if the respondent were not a municipality, it is necessary to consider whether such a contract could arise in view of the statutory restrictions upon respondent."

Respondent claims that there is no such liability by reason of the fact that it is a municipality; that there exist cases based upon local law to the effect that (a) municipal employees who accept payment of wages without noting protests, waive their claims for any extra pay which might be due them, and (b) municipal employees cannot receive overtime payments in the absence of an express statute or regulation under which the municipality has agreed to be liable for payment of overtime.

We respectfully contend that while such decisions, based on local law, are at times of doubtful applicability even as to shore-side municipal employees, they are entirely inapplicable to seamen, and more particularly, to the petitioners.

Living as we are at the midway point of the 20th century, it should now be recognized that, through various national and local collective bargaining agreements, and through statutes such as the Fair Labor Standards Act, and the counterparts of such agreements and legislation which have found their way into various State Wage and Hour Acts, there has resulted a substantial reduction or elimination of long work-weeks, with insistence that overtime be paid for hours of work in excess of the recognized work-week. This has for a long time now been recognized as part of our established pattern of the economic facts of life. Why the City should insist that its seamen be accorded different treatment is not clear.

In *Wright* v. *State of New York,* 233 N. Y. 44 (1918), the Court held that where a "laborer, workman or mechanic" is employed by a State Department of Public Works, and he is required to work extra hours beyond a statutory 8-hour day, he would be entitled under New York Labor Law, Section 220, to be paid overtime at the prevailing rate, even though he accepted his monthly salary without noting his protest for two years; and this, although he was never promised extra pay, and no one had authority to promise him overtime wages. This case seems to be almost identical with the instant case, except that there has never been any ruling as to whether seamen are "workmen" within this statute, or whether they have similar protection and rights only as wards of the Admiralty Court, irrespective of this enactment, i.e., under general maritime principles of substantive law.

The *Wright* case was cited with approval in *Pedersen* v. *J. F. Fitzgerald Construction Co.,* 293 N. Y. 126 (1944),

and also in *U. S. ex rel. Johnson* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2d, 1938).

The City claims that, in the absence of a specific local statute, no one was authorized to bind the City to make such a commitment. But in *McNulty* v. *City of New York*, 168 N. Y. 117, it was held that at common law, if the City ordered its employees (street cleaners) to work overtime with the understanding that they would be paid therefor, the City would be held liable to the men, and the fact that no appropriation had been made to cover overtime thus ordered, would not be considered a defense.

In *Bachelder* v. *Pickford*, 62 Me. 526, it was also held that a laborer, employed for a 10-hour day, who works thereafter at the request and order of his employer, is entitled to overtime wages.

A City employee, who is given an order by his superior, is entitled to rely on its being valid, and he is justified in acting upon it, even though, in fact, the order may have been made by a City Board without legal authority.

> *Dushane* v. *Kazmierczak, et al.*, 79 N. Y. Supp. (2d) 293 (Sup. Ct. 1948) aff'd 86 N. Y. Supp. (2d) 480 (App. Div. 4th, 1948).

How much stronger is the case of a seaman, who has no alternative, except to obey, being subject to the laws and discipline of the sea.

In *Geatrey* v. *Mayor etc. of the City of New York*, 171 N. Y. 61 (1902), the plaintiff was engaged to pave streets for the City under a specified written contract. Those representing the City, who supervised the work, required the plaintiff to perform extra work, including overtime, and then refused to pay on the ground that (1) the plaintiff had signed a release on being paid the sum admittedly due under the agreement, and (2) payment for extra work, if not covered by the original contract and specifications, was unauthorized by local law, and therefore the work should

not have been done by the plaintiff. With respect to these arguments, the court stated at p. 72:

> "The plaintiff did not choose to put himself in the attitude of refusing to obey the directions of the commissioners, thereby assuming the position of a defaulter under a contract with the city, but preferred to perform it as best he could, excepting under the final certificate such amount as the city admitted to be due him, subject to reservation of his rights under oral protests and the written release under seal, to which reference has already been made."

> "As we have seen, by oral protests and by the written release, the plaintiff carefully reserved his rights and the city paid under the final certificate of the commissioners only the sum it conceded to be due, and has in no way taken action to its prejudice upon the alleged waiver of the plaintiff."

The *Geatrey* case has been followed in *People ex rel. Powers & Mansfield* v. *Schneider,* 191 N. Y. 523; *Borough Construction Co.* v. *City of New York,* 200 N. Y. 149, and other lower State Court decisions.

If a contractor, working for the City may recover for extra work ordered by those assigned by a municipality to supervise work, though the order does not conform with State and City statutory requirements, why should not a seaman be entitled to compensation where he has been ordered to perform extra services, outside of his normal working day, under circumstances in which it has been confirmed by practice and express assurances of his superiors, that compensation would be made?

Even in shoreside cases, not involving seamen, it has been recognized similarly by federal courts that where a City obtains the benefits of a contract which is invalid because not authorized by local law, it must, nevertheless, either pay in the reasonable value of the benefits thus received, or else make restitution.

Busch-Sulzer Bros.-Diesel Engine Co. v. *City of Walters,* 133 Fed. (2d) 65.

National Surety Corporation v. *City of Allentown,* 32 F. Supp. 700.

Transbay Construction Co. v. *City and County of San Francisco,* 35 F. Supp. 433, rev. 134 Fed. (2d) 468, cert. den. 320 U. S. 749, 64 Sup. Ct. 52.

In *Rodgers and Haggerty Inc.* v. *City of New York,* 285 Fed. 362 (C. C. A. 2nd, 1922), cert. den. 261 U. S. 621, 43 Sup. Ct. 432, the City of New York, through its street cleaning department, ordered the libellant to unload ashes from a city scow, and then refused to pay for it, on the ground that the contract was not entered into, nor authorized, in the manner required and provided by the City Charter, i.e., that the attempted contract was ultra vires, and therefore void. The Court commented that under the New York City law, if this were a shoreside occurrence with the suit instituted in a State Court, possibly a recovery might not be allowed. However, since this was a Federal Suit in Admiralty, based on a maritime contract cognizable in Admiralty, it was held that the City would not thus be permitted to prevent enforcement of rights recognized by federal law. The decision points out that a contrary ruling might result in different decisions in different cities and states, each adopting its own rules and "this would be a clear impairment of uniformity" (fol. 364). This Court further stated:

> "It is admitted by the answer that the work was performed, and it is pleaded that the comptroller refused to pay because of the terms of section 149 of the City Charter (Laws 1901, c. 466). The appellee's bill was approved as correct by the proper officials; a clerk of the street cleaning department and the superintendent of final disposition certifying the services for which the charge was made were duly ordered and had been properly rendered."

* * * * * *

"The question presented by this appeal is whether this suit may be maintained in admiralty, when it appears that there had been no ordered revision and approval by the department of finance of the City of New York, and no competent evidence adduced of the value of the services performed. It is established in the courts of the state of New York that an action may not be maintained where it appears that the amount has not been audited and settled by the department of finance, and where, upon the trial, the plaintiff does not adduce testimony establishing his claim by competent evidence, of value. Smith Contracting Co. v. City of New York, 146 App. Div. 760, 131 N. Y. Supp. 479. But this is a suit on a maritime contract and is maintained by the libellant as a suit in admiralty. Such engagement and obligations cannot be nullified by the local laws of the city or state, where the contract happens to be entered into so as to prevent its enforcement in an admiralty court of the United States. Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261.

In the Lottawanna, 88 U. S. (21 Wall.) 558, 22 L. Ed. 654, the Court said:

> 'One thing, however, is unquestionable: The Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states.'

The Supreme Court has held that neither the local law nor the decisions could deprive one of redress, where the cause of action, maritime in its nature, was prosecuted in a court of admiralty of the United States. Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314."

In *The Grabit,* 33 F. 2d 541 (E. D. N. Y., 1929), the City entered into a contract with the libellant to make specified repairs to one of its dredges. The persons whom the City then assigned to supervise the work insisted that additional

repairs be made, under the threat of otherwise terminating the employment, and imposing forfeiture penalties, under a completion bond. Libellants did the work as ordered, and then sued for extra service rendered, in Admiralty. A decree was awarded for the extra services rendered, with a special commission being appointed to determine the precise amount of extra work, and its reasonable value. District Judge Campbell stated at p. 543:

> "(6) This is not a law suit at law but in admiralty, and the decisions of the law courts cited by the respondent are not controlling."
>
> * * * * * *
>
> "(11) There is considerable doubt whether the commissioner or his engineers had authority to place open market orders for extras, but their power to stop the work and take it away from libelant, forfeit the bond, and then enforce the penalties, to the prejudice of the libelant, cannot be questioned.
>
> It is also undisputed that they threatened to do these very things unless libelant did the work and furnished the materials demanded, without further written orders and regardless of the increased cost to the libelant, and this was a clear breach of the contract for which the libelant is entitled to recover damages. American Pipe & Const. Co. v. Westchester County (C. C. A.) 292 F. 941; Horgan v. City of New York, 160 N. Y. 516, 55 N. E. 204; Messenger v. City of Buffalo, supra; Mulholland v. Mayor, supra; Uvalde Asphalt Paving Co. v. City of New York, 154 App. Div. 112, 138 N. Y. S. 1029; Merrill-Ruckgaber Co. v. City of New York, 160 App. Div. 513, 145 N. Y. S. 577; Uvalde Contracting Co. v. City of New York, 160 App. Div. 284, 145 N. Y. S. 604."

On appeal this decision was affirmed in 54 F. (2d) 490 (C. C. A. 2d, 1931), Judge Learned Hand stating:

> "To remedy the supposed injustice so arising the New York Court of Appeals decided that in cases of municipal contract the contractor might perform the extra work exacted and recover the cost. Gearty v.

City of New York, 171 N. Y. 61, 63 N. E. 804. This has no relation to a quantum meruit, but is allowed as an action for damages on the breach. The doctrine is well-settled and we have ourselves followed it. American Pipe Co. v. Westchester County (C. C. A.) 292 F. 941. It is confined to public corporations, cities, towns and the like, and is rather a part of local and municipal, than of general or commerical law. Detroit v. Osborne, 135 U. S. 492, 10 S. Ct. 1012, 34 L. Ed. 260; American Surety Co. v. Bellingham Nat. Bank, 254 F. 54 (C. C. A. 9); Boston v. McGovern, 292 F. 705, 712 (C. C. A. 1). We accept it as controlling, regardless of whether we could ourselves have reached the same result unaided.

* * * * * *

"Here all the disputes affected to concern repairs or additions to the dredge, and really did; the only room for doubt was whether they fell within the contract. While it is clear to us that most of the items did not, we hold that fact irrelevant; else the exception will swallow the doctrine, which in any case necessarily presupposes that the demands are excessive.

All this is beside the question as to how far the orders of the dock commissioner or his representatives to perform the extra work, were conclusive upon the contractor. The contract gave the commissioner power to 'determine the amount, the quantity or quality of the work,' 'all questions in relation to said work and the performance thereof' or 'which may arise relative to the execution of this contract'; and his decision shall be final and conclusive.'

* * * * * *

"The contractor sued for extra work, and by hypothesis showed that the specifications did not cover what he was compelled to do. It is true that he must recover upon a breach of the contract; but the recovery is none the less for work which the contract did not require—for extra work in the strictest sense. Whatever the resulting anomaly, so much cannot be doubted. If the city does not meet this prima facie case by showing that the claim was not for extra work because the commissioner found that it was within the contract, the

> case stands that the city has exacted services to which it was not entitled, that this was a breach and that the measure of damages is the value of what was done."

In *re Highland Navigation Corp.*, 24 Fed. (2d) 582 (S. D. N. Y., 1927) the City of New York had an ordinance requiring shipowners to remove any of their vessels which might become wrecked in local waters. A vessel was wrecked in local waters, and the shipowner sought to abandon it under Federal law. On the other hand, the City claimed that the shipowner could not abandon the wreck, because it was required by local law to remove it. In holding against the City, the Court ruled that local law could not alter a right which the General Maritime Law gave the shipowner, stating at p. 585:

> "There is no justification for implying a promise to comply with an ordinance, and to remove or pay for the removal of the wrecks, when under the general maritime law an owner may abandon a vessel which sunk without any liability for its removal."

The decision was affirmed at 29 Fed. (2d) 37 (C. C. A. 2nd, 1928).

In *Moran Towing & Transportation Co. of City of New York,* 36 Fed. (2d) 417 (S. D. N. Y., 1929), the City hired a scow by charter, upon authorization of someone in the office of the Commissioner of Docks, and then refused to pay for such hiring on the ground that this contract had been entered into in a manner not authorized by the City Charter and the Board of Estimate, in that there had been no sealed bids, etc. The Court nevertheless, in a suit in admiralty, allowed a recovery, refusing to be concerned with local regulations.

POINT IV

There was no valid accord and satisfaction, because it was not based on consideration.

Acceptance by an employee of wages concededly due him cannot constitute an accord and satisfaction, there being no consideration for the employee's giving up his claim for extra compensation.

Wilson v. *Hitchcock,* 174 N. Y. Supp. 673.
Schnell v. *Perlman,* 238 N. Y. 362.
Birbales v. *Cuneo Printing Ind.,* 140 F. (2d) 826.
U. S. v. *Bostick,* 94 U. S. 53.
Penn R. Co. v. *M. McGirr's Sons Co.,* 287 Fed. 334, cert. den. 43 Sup. Ct. 520, 262 U. S. 743.

Further, where a statute fixes hours of work, the protection of the employee becomes a matter of public policy; and acceptance of lesser wages than are due, even though coupled with a release, will not constitute a waiver, estoppel, accord and satisfaction, or release of the employee's claim.

Philpott v. *Standard Oil Co.,* 53 F. Supp. 833 (D. C. Ohio, 1943).

In any event, compensation for overtime worked under a special agreement relating to overtime, is not the same thing as base salary, so that the right to recover overtime wages would not be affected by an employee giving receipts for salary for the months in which such work was rendered.

Heywood v. *Doherty,* 129 N. Y. Supp. 507 (1911).

This would be especially true in a seaman's case, where even a release would not bar a seaman, or constitute an accord and satisfaction, without a proper consideration

therefor. *Garrett* v. *Moore-McCormack Lines, Inc.*, 317 U. S. 239, 63 Sup. Ct. 246 (1942).

In *Cox* v. *Lykes Bros. Shipping Board*, 237 N. Y. 376 (1924) a seaman, employed by the U. S. Shipping Board, was held up in his pay for some time, and then he was finally paid only his earned wages, but not additional pay for the period of delay. At the time when he had finally been paid his earned wages, he had signed a "mutual release" as required by Federal statute. In holding that this did not bar him from recovering any extra wages due him, Judge Cardozo stated at page 382:

> "A different question would be here if his right to wages were shown to have been the subject of reasonable controversy. So far as the record shows, payment was withheld without color of excuse. Upon such a showing, wages earned during delay were plainly due as wages earned during the voyage. Release of the whole, when the right is uncontested, is not a fair condition of payment of a part."

See also, *The Montague*, 53 F. Supp. 548, wherein, in a seaman's case, the Court held that where a seaman has been paid certain benefits to which he was entitled, and has even signed a release, it still would not constitute a valid, binding accord and satisfaction, so as to bar him from claiming additional sums due, arising out of his employment.

The decision rendered by Judge Ryan following the pretrial hearing contained an erroneous ruling to the effect that "signing without protest places upon them (the seamen) a very heavy burden of proving that these receipts were not in full accord and satisfaction of their claims" (fol. 52), and this decision was, of course, followed by Judge Weinfeld in his opinion rendered after trial (fols. 395, 416, 417). We submit that both learned judges were in error in placing a "very heavy" burden of proof on the seamen to show that there was not an accord and satisfaction. Judge Weinfeld stated that he had "carefully scrutinized" the circumstances surrounding the execution of the semi-

monthly payroll before rendering his decision (fol. 16). We do not quite understand the purpose of this statement, for there was nothing there to "scrutinize". Petitioners did not claim that they were unaware that they were signing the payroll. They simply have claimed that there was no consideration so as to constitute a valid accord and satisfaction for giving up their overtime claim, when they were only paid base wages admittedly due. As a matter of law, this part of the ruling was therefore also clearly erroneous.

Muruaga v. *U. S.*, 172 F. (2d) 318 (C. C. A. 2d, 1949).

CONCLUSION

The City ought not to be permitted to be unjustly enriched by imposing overtime orders on seamen for which payment is promised by those on whose instructions they have a right to rely, only to renege on those promises later.

There seems to be something basically and morally indefensible in permitting a municipality to represent to its seamen that they are governed by Federal Law, only to then change its position by relying on local law. Shore employees of the City have some protection, in that they may avail themselves of the "prevailing rate" procedure set forth under the New York Labor Law. These seamen, who had been properly advised by their employer that this procedure was not available to them, did not have this protection.

It should not be permissible for an employer to take advantage of his employees, particularly, as to those who are wards of Admiralty, on a cause of action cognizable in a maritime court, and who, as seamen, may not avail themselves of the New York Labor Law provisions, as the City itself has recognized through the years (Special Order 234).

A writ of certiorari should issue to the Court of Appeals for the Second Circuit, so that a decision may be obtained on the important question of whether the authority of captains of such craft is to be lessened; whether there shall be permitted involuntary servitude on such ships; and whether seamen employed by municipalities are to be governed by local laws, rather than Federal Maritime Laws.

The determination of these questions are of great importance, not only because of the five suits involved herein, but also because they will affect municipally employed seamen in the various ports of the United States.

Respectfully submitted,

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Office - Supreme Court,
FILED
HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1953

No. 130

CLARENCE SORENSON, RICHARD E. PICKETT and NICK VOUTSIMAS, *Petitioners,*

against

CITY OF NEW YORK, *Respondent.*

ARISTOTLES DENDRINOS, JOHN BUGIURIS, COSTAS SCORDARIS, THOMAS WATLER, WILFRED M. SMITH, WILLIAM FERGUSON, JOSEPH P. McDONOUGH and STUART AINSWORTH, *Petitioners,*

against

THE CITY OF NEW YORK, *Respondent.*

VASILIOS LABADARIS, ARTHUR SCHUMACHER, WILSON A. REX, JR., and ANTONIO SERRAPICA and OSCAR A. YOST, IRA S. DUKE and JOHN P. FLANAGAN, *Petitioners,*

against

THE CITY OF NEW YORK, *Respondent.*

EMIL FITTING, CANDIDO Y. RASCO, URBANO O. FERNANDEZ, JOHN ALMERICOTTI and MARTIN GILL, *Petitioners,*

against

THE CITY OF NEW YORK, *Respondent.*

ELIGIO B. SALVADOR, PERCY H. HAUFFMAN, CHARLES JAMES McCLEARY, MAYNARD L. VREELAND, CHARLES A. STUHLMAN, GEORGE A. SWEATING, THOMAS F. McGLYNN, SAMUEL N. RUBIN, ROBERT H. LUNT, WALTER LEANDER, ROBERT EMERY, JAMES F. PIEL, EDMUND C. YATES, JOHN B. L. ROMARD, JOSEPH O'CONNOR, THOMAS D. McNAMARA, JR., HUGH REID, RAYMOND P. FINNERTY, EMERITO M. CABALES and RALPH FONTANES, *Petitioners,*

against

THE CITY OF NEW YORK, *Respondent.*

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

These five suits were consolidated by stipulation, which provided that the decision in the suit filed by Clarence Sorenson against The City of New York be deemed binding on all libellants (341-343, 387*). They seek recovery of money damages for overtime work allegedly performed and not compensated and statutory penalty for non-payment (19-24).

Although the Answer to the Libel was in substance a general denial (with special defenses added), it was stipulated in writing before the trial that petitioner was employed by the City as engineer aboard its sludge vessels; that he worked overtime and was not paid for it; and that petitioner, except on one or two occasions, accepted his pay without noting his protests on the payrolls (338; 341).

The special defenses in the Answer of the City are: (1) failure of petitioner to note protests when signing payrolls; (2) laches covering a certain period, and (3) a statutory provision, 28 U. S. C. 791, limiting the period of recovery of possible penalty against the City for non-payment of overtime (27-31).

The issues to be determined were reduced by a pretrial decision of United States District Judge RYAN (41-53), 86 F. Supp. 688. He found that a "substantial question of law" existed "as to whether libellants are entitled to payment for extra hours of work"; therefore, that the punitive provisions of Sec. 596 (46 U. S. C.) could not be invoked in the absence of showing that the City wrongfully withheld payment without good cause (50).

Judge RYAN held also that there is no statute which provides for the payment of overtime wages to seamen in absence of contract; that 46 U. S. C. Sec. 596 limits

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* All references are to folios in the Record on Appeal, unless otherwise noted.

recovery "to such wages as have been contracted for between the seaman and the owner of the vessel" (48-49).

He found that "libellants do not allege any such express contract providing for overtime wages and none appears either in the pleadings or the stipulated facts; * * * however, it may be established that under the circumstances a contract might be implied in fact. This will be determined on the trial" (49).

The pre-trial decision concluded with the statement that but one other question of law remained for trial. This concerned the legal effect of libellants' signing payrolls without noting any protest, covering salary checks in 1944 and 1945. While the Court found that acceptance of salary without protest would not operate as a "release" of claim, it was "potent evidence" that such payments were in full under the terms of employment by the City and placed upon libellants "a very heavy burden of proving that these receipts were not in full accord and satisfaction of their claims" (51-52).

Therefore, the only issues that remained for determination at trial were noted by United States District Judge WEINFELD in his opinion: (1) whether or not there arose an "implied contract for the payment of overtime compensation," an issue involving the capacity of The City of New York to "enter into such an agreement" and (2) whether signing the payrolls without protest constituted acceptance of salary payments in full accord and satisfaction of any claim (395).

The Trial Court found, first, that libellant had failed to establish a contract implied in fact entitling him to recover; second, that libellant had failed to sustain the burden cast upon him of establishing that acceptance of salary checks without protest was not an accord and satisfaction of whatever claim might have existed (411; 416). The libel was dismissed, 98 F. Supp. 411.

The Decision of the Court of Appeals

The United States Court of Appeals, Second Circuit (SWAN, C. J.) affirmed the decision of the District Court. In the course of its opinion the Court of Appeals made findings and conclusions to the following effect:

1. Libellant Sorenson was aware of the fact that "no city employee had authority to promise compensation for overtime" (R. p. 149).

2. "It seems clear in New York that shore-side municipal employees cannot be paid overtime compensation unless the contract to pay it is made by a municipal agent authorized by local law to make the contract" (R. pp. 149-150).

3. There is no federal statute providing for payment of overtime wages to seamen (R. p. 150).

4. To make a valid agreement with the City, the local law of agency must be followed (R. p. 151).

5. To hold that the local law of agency "applies to seamen's contracts violates no essential policy or feature of the maritime law, since regardless of where the contract is made the rule that it must be a valid contract according to the local law will be uniform" (R. p. 151).

6. "The policy behind local restrictions which forbid committing a municipality to a contract by unauthorized acts of its employees should be upheld in admiralty as well as in other civil suits; for otherwise commitments may lead to financial embarrassment or even to fraud and imposition upon the municipality" (R. p. 151).

7. The mere acceptance by the City of New York of benefits under a "contract" made without authority of local law does not estop the City from challenging the validity of the "contract" and denying liability for services rendered. That is the law of the State of New York and, in the light of limitation of the rule stated in *Jensen* v.

Southern Pacific Co., 244 U. S. 205, 216, is applicable to seamen as well as shoreside workers employed by the City of New York (R. p. 154).

Question Presented

As stated in the text of the decision of the Court of Appeals (R. p. 149):

> "The question presented is whether a seaman on the city's sludge boats, who worked on certain days, pursuant to the captain's order, and in the absence of any emergency, more than the eight hours constituting his normal day's work, is entitled to overtime pay."

The Writ Should be Denied

Under "reasons for Allowance for Writ" (Pet. p. 8) it is stated in item "B" that the decision below "affects the rights of seamen employed by municipalities in the various sea ports of the United States" and asks whether seamen working for municipalities are to be "governed" by the uniform requirements of the federal maritime law or their rights are to vary from port to port.

Respondent urges that, unless petitioner clearly shows that the local laws of New York (State and City), threaten "the essential features of an exclusive federal jurisdiction" (*Just* v. *Chambers*, 312 U. S. 383, 392), there is no basis to support his petition.

This point has been squarely decided against petitioner in the lower courts, notably in the language of the Court of Appeals (R. p. 151):

> "To make a valid agreement with the City, the local law of agency must be followed; to hold that this applies to seamen's contracts violates no essential policy or feature of the maritime law, *since regardless of where the contract is made the rule that it must be a valid contract according to the local law will be uniform.*" (Italics supplied.)

POINT I

Petitioners' salaries were fixed by the Budget, and they may not recover compensation in excess thereof.

The salaries of these sludge workers, like those of all City employees, were fixed by the Board of Estimate through the Budget (340; 388; New York City Charter, Sec. 67). This fixation of salaries bars recovery of any additional wages:

Matter of Carr v. *Kern,* 279 N. Y. 42, 46-47 (1938);
Tyrell v. *The Mayor,* 159 N. Y. 239 (1899);
Haswell v. *The Mayor,* 81 N. Y. 255, 258-259 (1880);
Matter of Goldstein v. *Berry,* 232 App. Div. 583 (1st Dept., 1931);
Crane v. *City of New York,* 185 Misc. 456 (Sup. Ct. N. Y. Co., 1945), affd. 270 App. Div. 930 (1st Dept., 1946), affd. 296 N. Y. 717 (1946);
Matter of Hagan v. *Moses,* 173 Misc. 327 (Sup. Ct., N. Y. Co., 1939);
Matter of McCarthy v. *LaGuardia,* 172 Misc. 260 (Sup. Ct., N. Y. Co., 1939), affd. 259 App. Div. 710 (1st Dept., 1940), affd. 283 N. Y. 701 (1940);
McCormack v. *The Mayor,* 14 Misc. 272 (Sup. Ct., N. Y. Co., 1895).

In *Crane* v. *City of New York, supra,* the plaintiffs were employed by the City of New York as firemen and their annual salaries were fixed in the budget for 1943-44 at the rate of $3,000 per year. They claimed that during a portion of that fiscal year they had worked overtime in excess of the hours of work prescribed for firemen by statute. The action was brought to recover compensation for the

alleged overtime work in excess of the salaries paid to the plaintiffs. In rejecting the plaintiff's claim and dismissing the complaint, the Court at Special Term said (185 Misc. at page 458):

> "The fixation of the plaintiffs' salaries at $3,000 per annum bars them from receiving any additional compensation from the city for any services performed by them (*Matter of Goldstein* v. *Berry*, 232 App. Div. 583; *Matter of Hagan* v. *Moses*, 173 Misc. 327)."

And again, at page 459:

> "Plaintiffs, in the absence of an express statutory provision requiring defendant to pay them for overtime, are restricted to the compensation fixed for them in the budget. 'The public officer seeking payment from the public treasury must put his finger on some statute whereby payment is permitted * * *.'" (*Stetler* v. *McFarlane*, 230 N. Y. 400, 408.) To hold otherwise would be violative and disruptive of the budgetary scheme on which the city operates."

The dismissal of the complaint was affirmed by the Appellate Division and the Court of Appeals without opinion [270 App. Div. 930; 296 N. Y. 717].

In the instant case, it is conceded that the petitioners were paid their salaries as fixed in the New York City budget for the period during which they claim they are entitled to additional "overtime" compensation. Accordingly, under the New York law as set forth in the *Crane* case and the other cases cited herein, it is clear that they cannot recover "overtime".

Petitioners' position is that, by reason of certain statements or assurances made by their departmental superiors, an "implied" contract was created binding the City to pay overtime (398).

No contract may be created that is binding on a municipality to pay its own employees overtime. Section 160,

subd. 3, of the New York State Labor Law prohibits agreements for overtime compensation "upon work by or for the state or a municipal corporation."

In *McMahon* v. *State*, 36 N. Y. Supp. (2) 699 (1942), it was held (400):

> "As no official could subject the State to liability for such overtime work by express contract, in the face of the statutory prohibition cited, no such official could by his acts, either positive or negative, create a valid contract implied in fact. Lindlots Realty Corporation v. Suffolk County, 278 N. Y. 45, 52, 53, * * *; Burns v. City of New York, supra [1907]. Statutory limitations upon the power to impose an express contractual obligation binding the State to pay for overtime services are equally applicable to a like contract implied in fact. Miller v. Schloss, 218 N. Y. 400, 406, 407."

See also *Burns* v. *City of New York*, 121 App. Div. 180, 181-182 (1907), which restated the principle that one dealing with a municipal corporation is presumed to know its powers and limitations.

To the same effect are the decisions of the Federal Courts. In *United States* v. *Willis*, 164 F. (2d) 453, 455 (1947), it is said:

> "Under such circumstances, we think it perfectly clear that the United States cannot be held to liability on the theory that there was a contract between plaintiff and an officer of the government. He who deals with an agent of the government must look to his authority, which will not be presumed but must be established. He cannot rely upon the scope of dealing or apparent authority as in the case of a private agent. Sutton v. United States, 256 U. S. 575, 41 S. Ct. 563, 65 L. Ed. 1099, 19 A. L. R. 403; United States v. North American Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935; Whiteside v. United States, 93 U. S. 247, 256-257, 23 L. Ed. 882; The Floyd Acceptances, 7 Wall. 666, 676, 677, 19 L. Ed. 169."

In *Whiteside, et al.*, v. *United States*, 93 U. S. 247, 257 (1876), the Court expressed the public policy which controls when an individual is dealing with governmental officers or agents:

> "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. Mayor v. Eschback, 17 Md. 282.
>
> Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act."

As stated by Judge CARDOZO, "only clear warrant of law will justify the assumption of a power to control the public purse". *Peo. ex rel. Rand* v. *Craig*, 231 N. Y. 216, 221 (1921). See also *Stetler* v. *McFarlane*, 230 N. Y. 400, 408 (1921).

In their brief, Point III, petitioners cite cases based on agreements whose validity was not in issue, while in this case, as clearly pointed out by Judge WEINFELD in his opinion (407):

> "The present question is whether employees or officials of the city, either by positive or negative acts could legally have bound it to pay for overtime."

The District Court distinguished two cases cited by petitioners in their Point III, *Rodgers & Hagerty* v. *City of New York*, 285 Fed. 362 (C. C. A. 2) (1922), cert. den. 261

U. S. 621 (Br. p. 30) and *Moran T. & T. Co.* v. *City of New York,* 36 F. (2d) 417 (S. D. N. Y. 1929, Br. p. 34), noting that those cases did not involve the issue as to whether or not a valid contract existed (407). The issue here *is* whether or not a valid contract was created.

POINT II

The District Court found and the Circuit Court Affirmed that under "the law and the facts" petitioner "has failed to establish a contract implied in fact entitling him to recover" (411).

It was assumed for purposes of trial that petitioner performed extra work aboard the sludge vessels not within regular hours, at the times referred to in the libel, for which he was not compensated (338, 388). The claim here is for work over 8 hours per day by reason of delays because of weather conditions or additional daily trips made under orders of the masters of the vessels (389).

Petitioner (Sorensen) was granted some time off with pay for overtime work performed at various times between January 31, 1938 and March, 1946, but at *no time* was cash ever paid for overtime to anyone (69-70; 113; 119-120; 390).

Since 1947, petitioner received time off with pay for *all* overtime worked (77; 390-391).

Petitioner, who apparently exercised himself more than the others toward obtaining the time off due him, was not for a moment deceived into believing that he would receive *cash* for overtime worked:

> "It was the *established practice* (when he worked in the City ferries) to give everybody the time off, and there is nobody in the ferries that has any cause for complaint as far as that is concerned.
>
> When we were transferred into this new department ***naturally we assumed the same thing would prevail there***" (Sorensen, 87-88).

Again, at folio 70:

> **"On many occasions I would be notified by the captain to take a certain number of days off with pay."**

(See also folios 118; 124; 128-129; 139).

Petitioner Sorensen—as well as the other petitioners—was not employed under the conventional form of shipping articles executed by seafaring men. He submitted to and passed a civil service examination for the position of marine engineer (113). He testified that he was aware of the fact that he would receive a salary of $2,700 per annum fixed by the Budget of The City of New York and that there was no provision for overtime pay (113-115; Respondent's Ex. A, 379-381). Thus, Sorensen was beyond doubt on notice that, although he offered his services as a seaman, his wages were frozen in the City Budget, subject to the legal limitations affecting the compensation of every other City employee.

It is conclusive from the record, first, that never at any time was cash paid for overwork; second, that the men were invariably granted time off with pay, when it could be arranged; and last, that their salaries were fixed in the Budget and they were aware that no provision existed therein for paying cash overtime. From the foregoing it is perfectly clear that these overtime services were rendered with no expectation of cash compensation. The alleged benefits received by the City in overtime services are referred to in petitioner's brief (p. 29). But the receipt of benefits furnishes no basis under the New York law for holding liable a municipal corporation if there has been a failure to comply with statutory requirements relating to the making of a contract.

The New York Court of Appeals has ruled that no enforceable obligation is created against a municipality

under an "implied contract" which is invalid because not in accord with statutory requirements. In *Seif* v. *City of Long Beach*, 286 N. Y. 382, 387 (1941), the Court said:

> "Mere acceptance of benefits by the city under a contract made without authority does not estop a municipal corporation from challenging the validity of the contract and from denying liability for materials furnished or services rendered under a contract not made or ratified by a board or officer acting under authority conferred by law and in the manner prescribed by law. (McQuillan, Municipal Corporations, § 1358.) Where the Legislature provides that valid contracts may be made only by specified officers or boards and in specified manner, no implied contract to pay for benefits furnished by a person under an agreement which is invalid because it fails to comply with statutory restrictions and inhibitions can create an obligation or liability of the city."

POINT III

The status of petitioners as seamen works no advantage to them in the face of the law controlling the power of the City to contract.

No essential characteristic or feature of the General Maritime Law is impaired by insistence upon compliance with local law.

Petitioners argue that local laws limiting the power of the City to contract should not be applied to them because those laws contravene the general maritime law and therefore should be given no effect. They rely on *Workman* v. *City*, 179 U. S. 552 (1900) and *Frame* v. *City*, 1940 A. M. C. 1935 34 F. Supp. 194. These cases are clearly distinguishable from the one here. The *Workman* case involved damage done by a City fireboat. The issue was raised by the City as to its immunity on the theory that it was performing

a governmental function at the time of the disaster. It is clear that in the *Workman* case the power sought to be asserted in favor of the City would, as the Court pointed out, result in the abrogation of the uniformity of maritime law, for a municipality by its own *fiat* could immunize itself from liability for torts committed by it on navigable waters of the United States.

The *Frame* case, too, was one founded in tort and brought under the Jones Act. The City sought to defeat the suit on the plea that Frame (and this was conceded) had failed to comply with the local law requiring the filing of formal claim against the City before the bringing of an action. The Court found that the City was attempting to impose mere local *procedural* requirements in order to defeat the very cause of action which was granted to the libellant by the Jones Act.

To the point made by petitioners that the local laws restricting the power of the City to contract are in contravention of general maritime law, we answer that the principle of public policy limiting the authority of a public officer to bind the governmental agency is one of general application and is not subject to variance in any part of the country. Therefore, since the principle is of universal application, and is in itself uniform, there is no point at which it threatens the stability of the general maritime law.

The Courts below rightly held that the rule governing the authority of public officers to bind the governmental agency may not be ignored and must be weighed against petitioners' asserted stand as seamen (405-406; R. p. 151).

The decision of the Courts below does not impair the uniformity of the General Maritime Law or any of its characteristic features.

Just v. *Chambers*, 312 U. S. 383 (1940). In that case this Court said (p. 389):

> "* * * the principle was maintained that a State, in the exercise of its police power, may establish rules

> applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations.' "

(*Ibid.* p. 390):

> "There was the further pertinent observation that the maritime law was not a complete and perfect system and that in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration. These views find abundant support in the history of the maritime law and in the decisions of this Court."

(*Ibid.* p. 391):

> "This criterion is manifestly not limited to cases of wrongful death. It is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction. See *Minnesota Rate Cases,* 230 U. S. 352, 402-410."

Inherent in petitioners' contract of employment by the City were the local laws of New York and the rule of public policy barring public officers or agents from binding the municipality except according to local law. They were well aware that their salaries were fixed by the budget and that outside of its appropriations therein no funds were forthcoming.

The rule of public policy protecting governmental agencies from unauthorized commitments is itself a firmly established principle of federal decisional law. This rule would be just as applicable to petitioners if they were em-

ployed as seamen by the United States Government and sought overtime compensation.

United States v. *Willis,* 164 F. (2d) 453, 455 (1947);
Whiteside, et al. v. *United States,* 93 U. S. 247, 257 (1876).

We conclude with a pertinent quotation concerning the substantive concurrence between the maritime law and the common law, from *The Harrisburg,* (1886) 119 U. S. 199, 213:

> "The rights of persons in this particular under the maritime law of this country are not different from those under the common law, and as it is the duty of courts to declare the law, not to make it, we cannot change this rule".

The Alaska, (1889) 130 U. S. 201;
The Corsair, (1892) 145 U. S. 335;
The Albert Dumois, (1900) 177 U. S. 240, 259.

POINT IV

Petitioners signed innumerable payrolls without protest during the period for which they seek overtime wages. This is an accord and satisfaction, barring recovery.

The District Court rejected petitioners' claim upon the additional ground that they failed to sign the payrolls under protest, a pre-requisite to recovery under New York law. The United States Court of Appeals found it unnecessary to pass on this question in the light of its holding as to the invalidity of petitioners' alleged contract with the City. We shall discuss this aspect of the case briefly.

Petitioners signed innumerable payrolls without protest. They were aware that their salaries were fixed by the

Budget and there is no claim that they were not paid their salaries in full (115; 179; 183; 187; 189; 215; 223; 256-260; 267; Libel 19-24).

As declared in Judge WEINFELD's decision, the courts of New York have consistently held that such signing without protest establishes a statutory accord and satisfaction (414):

> "This provision which has been inflexibly applied by the State courts creates a 'statutory accord and satisfaction' ".
>
> *Finn* v. *City of New York*, 282 N. Y. 153 (1940); *Quayle* v. *City of New York*, 278 N. Y. 19 (1938); *Toscano* v. *McGoldrick*, 300 N. Y. 156 (1949).

This statutory accord and satisfaction is found in the provisions of § 93C-2.0, Administrative Code of The City of New York; the requirement being that every City employee sign the payroll as a receipt for his salary check; that such signature, in the absence of any notation of protest,

> "shall be deemed • • • an accord and satisfaction of all claims against the City for wages or salary due to such person from the City for the period covered by such payroll."

That seamen can claim no more immunity than employees in other categories was held in *Jordan* v. *Texas Co.*, 123 Fed. (2) 614, CCA 4, (1941) a suit in Admiralty brought by a deckhand for "overtime." The Court noted that, as to the merits, the overwhelming weight was in favor of respondent; in addition, the libellant had signed receipts for the wages he received every two weeks, without protest.

In the *Jordan* case, as here, no payment for the overtime was included in any of the checks. The Court held (615):

> "It is clear that he had no contract for payment overtime and signed a receipt for services rendered

> every two weeks. There is no suggestion of mistake, and the receipts constitute overwhelming evidence that the obligation of the libelee had been discharged by payment."

Even were the provisions of the Administrative Code § 93C-2.0 not applicable to petitioners as seamen, they have made a binding accord and satisfaction based on "overwhelming evidence."

The libel itself (19-24) refers to the period 1938 to 1946, during which these petitioners signed hundreds of payrolls without noting protests; moreover, this circumstance, coupled with the numerous discussions among them and their superiors relating to overtime work which had accumulated, shifted to petitioners the burden of going forward. Judge WEINFELD declared (415):

> "As libellant concedes, it is an evidentiary fact to be considered by the court and shifts to him the burden of going forward with proof that acceptance of the base wage was not in full accord and satisfaction of the claims made—a burden which Judge RYAN held was a 'very heavy' one under the facts."

The decision in *Muruaga* v. *U. S.*, 172 F. (2d) 318 (CCA 2d, 1949), cited by petitioners (Br. p. 37) is plainly not in point because it was an isolated instance of a seaman who signed a release. Since the circumstances are unlike those here, the citation is not pertinent except for the practical point as to the test to be applied to a seaman's release (p. 321):

> "Each case is to be decided on its own established facts."

That is precisely what the District Court has done in this case, reaching the conclusion that

> "Even after applying the liberal rule enunciated in *Garrett* v. *Moore-McCormack Co., Inc., supra,* libel-

lant has failed *under the facts disclosed herein* to meet the burden cast upon him" (416; emphasis supplied).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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